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No. 86-1732

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1986

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CITY OF ARLINGTON, TEXAS,

*Petitioner,*

v.

LESTER M. BYRD, *ET AL*,

*Respondents.*

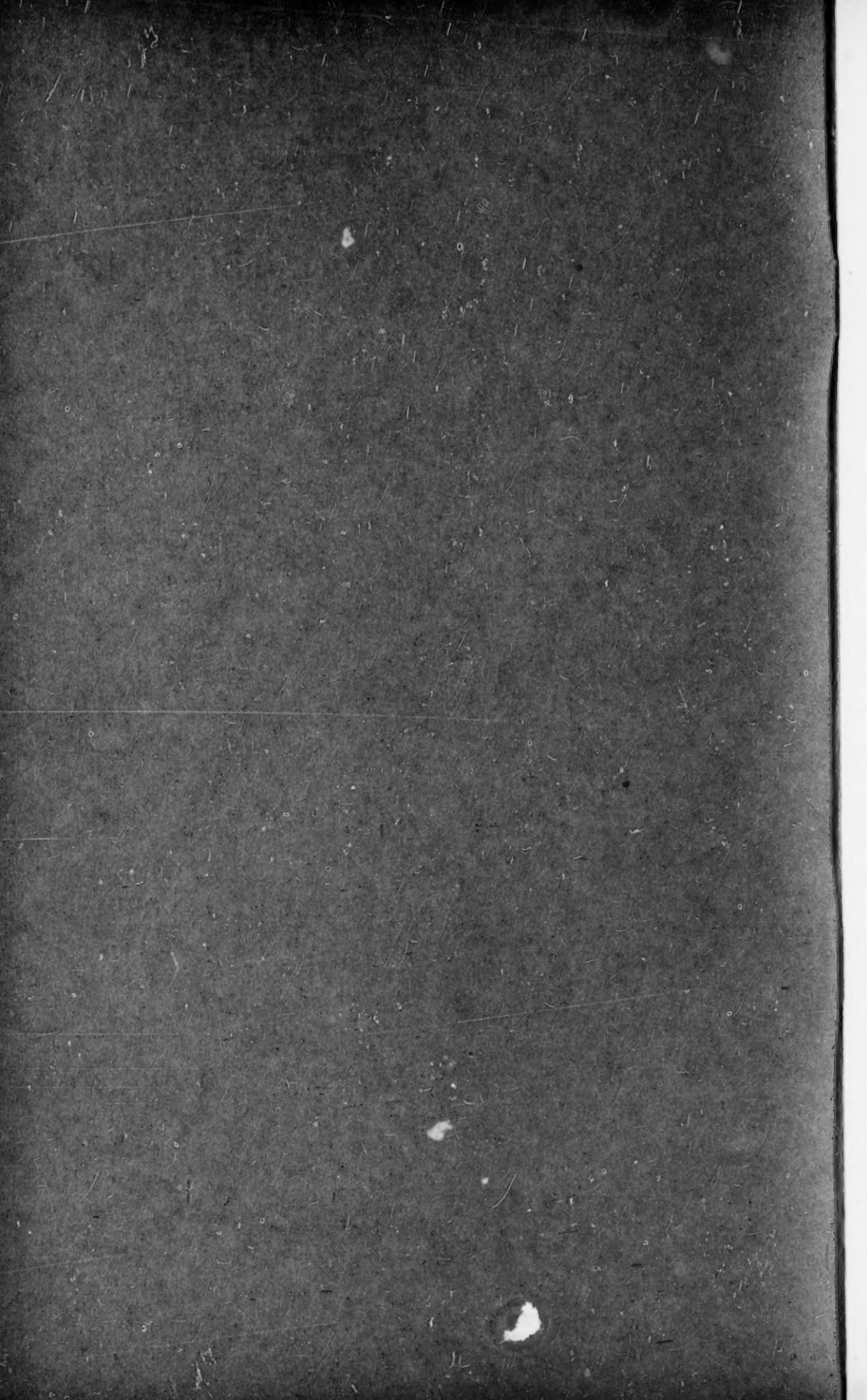
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**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF TEXAS**

— 0 —  
**RESPONDENTS' BRIEF IN OPPOSITION**

— 0 —  
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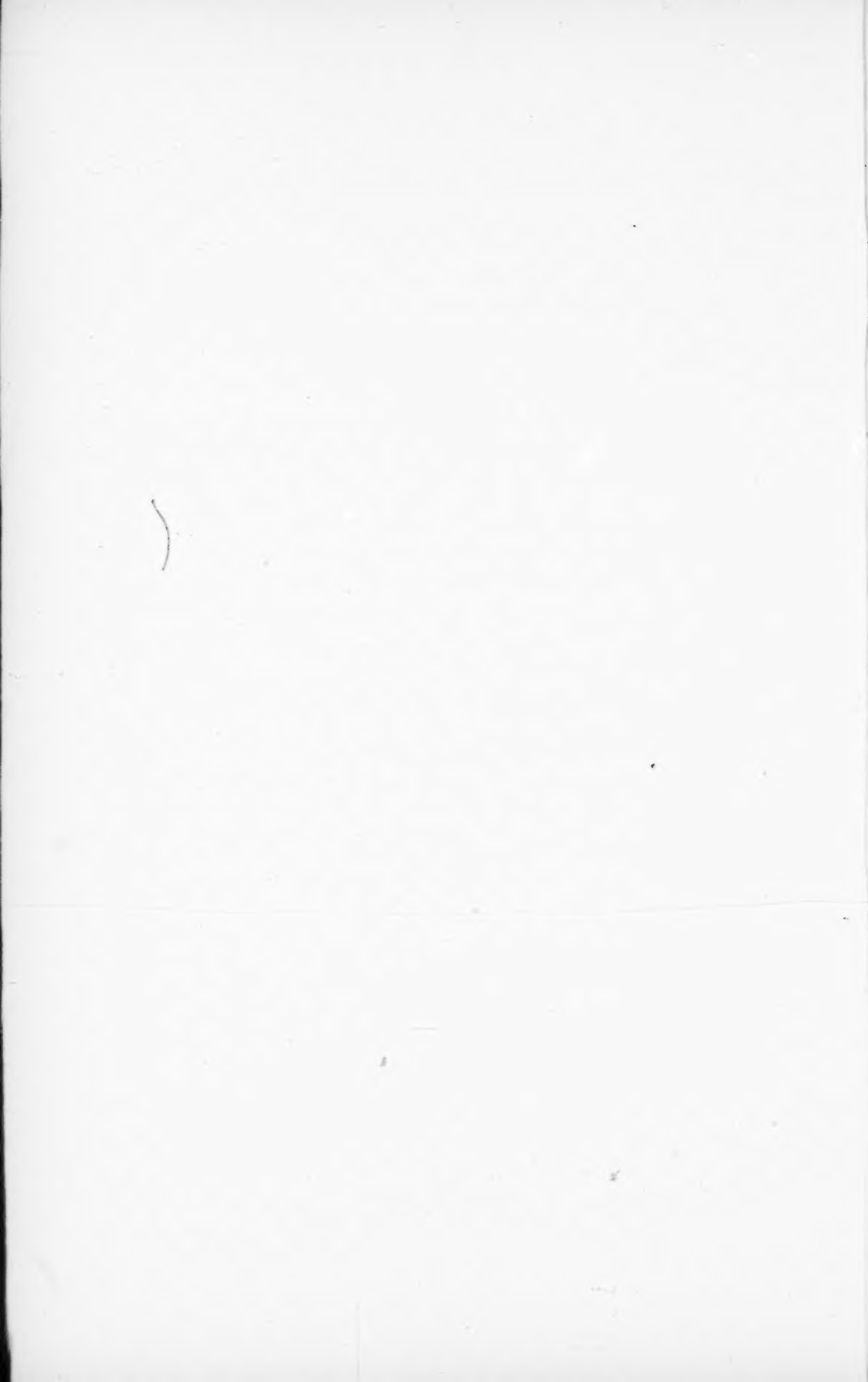
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**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF TEXAS**

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**RESPONDENTS' BRIEF IN OPPOSITION**

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Respondents, Lester M. and Wanda J. Byrd; Abram H. and Sandra L. Clark; Homer and Mary Ellis; James and Imogene Hayes; Walter S. Holtzclaw; Joel and Barbara Laxson; E.E. and Lois Rawdon; Elizabeth Sandlin; G.R. and Dovie Stephens; John Sullivan; Virgil E. and Betty S. Waldrop respectfully request that this Court deny the Petition for Writ of Certiorari to the Supreme Court of The State of Texas for the reasons stated below.

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## STATEMENT OF THE CASE

Petitioner's Statement of the Case contains significant errors and omissions in the following particulars:

(1) The ordinance enacted by the Petitioner, City of Arlington, Number 84-27, levied assessments for paving costs against Respondents and fixed a charge and lien against their property.

(2) Respondents filed suit in the 141st District Court of Tarrant County, Texas, seeking to declare the assessments null and void, alleging a cause of action under TEX. REV. CIV. STAT. ANN. art. 1105b and under 42 U.S.C. § 1981, 1982, 1983, 1985, 1986 and pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, and TEX. CONST. art. I, § 17, among other provisions, and seeking reasonable and necessary attorney's fees. Petitioner filed no special exceptions or made any other objection to Respondents' pleadings in the trial court.

(3) Subsequent to signing the Judgment, the trial court issued Findings of Fact and Conclusions of Law in support of its judgment. Included were the following Conclusions of Law:

CONCLUSION OF LAW NO. 2: "An assessment against the property and its owner for paving improvements in an amount greater than the benefit conferred violated TEX. CONST. art. I, § 17, and the Fifth and Fourteenth Amendments of the United States Constitution and amounts to a taking of private property for public use without just compensation."

CONCLUSION OF LAW NO. 9: "There was no evidence presented to the Arlington City Council as to special benefits accruing to Plaintiffs or their prop-

erties at the public hearing held on November 22, 1983."

CONCLUSION OF LAW NO. 11: "Plaintiffs and their properties received no special benefits as a result of the improvement of Pleasant Ridge Road between Little Road and Kelly Elliot Road."

CONCLUSION OF LAW NO. 19: "The levy of special assessments and the filing of liens against Plaintiffs and their properties deprived Plaintiffs of significant property interest without due process of law."

CONCLUSION OF LAW NO. 20: "Plaintiffs are entitled to reasonable attorney's fees unless special circumstances would render the award of fees unjust."

CONCLUSION OF LAW NO. 22: "No evidence was presented that would show or establish that the award of attorney's fees would be unjust."

(4) Petitioner's Statement of the Case mischaracterizes the trial court's actions regarding Petitioner's Requested Conclusions of Law. While Petitioner did make the requests described on Page 5 of Petitioner's Statement of the Case, the trial court did not "refuse" to make any such findings. Rather, the trial court merely did not make such additional requested findings. Petitioner had the right to seek review of such failure to make findings on appeal under Texas Rules of Civil Procedure, but failed to do so.

(5) Petitioner failed to properly object to Respondents' offer of evidence concerning attorney's fees, merely asking the Court for a "running objection", which was not sustained or overruled, and which does not properly preserve error under Texas Appellate Procedures.

(6) The trial court did not "refuse" to identify any theory upon which the award of attorney's fees was predicated. The Conclusions of Law issued by the trial court established the necessary elements to justify award of attorney's fees under 42 U.S.C. § 1988.

(7) The court of appeals' opinion referred only to the wrongful filing of the assessment liens by Petitioner as providing the constitutional basis for an award of attorney's fees, although the trial court's Conclusions of Law clearly found a constitutional violation in the levy of the assessments by Petitioner.

(8) The "ripeness" issue addressed by Petitioner in Question 2 and Reason II was not presented for review by Petitioner in the state courts, but was only presented by an amicus brief, and then only in connection with Petitioner's Application for Writ of Error to the Texas Supreme Court. Such issue was not presented to or addressed by the court of appeals.

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### **REASONS FOR DENYING THE WRIT**

The only portion of the trial court's judgment which Petitioner seeks to have this Court overturn is the award of attorney's fees to Respondents' attorney. Petitioner seeks to accomplish this result by mischaracterizing the case as one essentially involving only the filing of void assessment liens and by attacking the court of appeals' opinion which recognized the filing of the liens as providing constitutional support for the award of attorney's

fees in order to attempt to manufacture some conflict where none exists.

Respondents submit the court of appeals' opinion does not incorrectly state the law, it merely omits the other, perhaps more compelling, constitutional violations which support the trial court's award of attorney's fees. Even if the court of appeals' opinion had contained an incorrect statement of the law, if the judgment is correct, any misstatement by the court of appeals would not warrant certiorari review by this Court. As stated in *Herb v. Pitcairn, et al.*, 324 U.S. 117, 125, 126 (1945):

"Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to review opinions."

As stated by Petitioner in the Statement of the Case, the Texas Supreme Court denied Petitioner's Application for Writ of Error with the notation "Refused. No Reversible Error". According to Rule 133 of the Texas Rules of Appellate Procedure, such notation is used by the Texas Supreme Court when that court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal. Accordingly, while the court of appeals' opinion may be a decision of the State's highest court for technical jurisdictional purposes, it certainly does not make the court of appeals' opinion a "decision of the Supreme Court of Texas". Petitioner's statements such as "The decision of the Supreme Court is in conflict [sic] the decision of this Court" are misleading at best, and at worse smack of an

attempt to attach more import to this case than is appropriate. An analysis of the questions presented and Petitioner's claimed reasons will show the true nature of the case.

42 U.S.C. § 1988 permits the award of attorney's fees to the prevailing party in any action or proceeding to enforce a provision of 42 U.S.C. § 1983, and 42 U.S.C. § 1983 provides, in part, that every person who, under color of state law, causes another to be deprived of any rights, privileges or immunities secured by the Constitution shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Therefore, the threshold question in this case is whether there existed a constitutional deprivation by the City of Arlington which gave rise to a proper proceeding for redress, which supports the award of attorney's fees. Petitioner would have this Court grant Writ of Certiorari and find no such constitutional deprivation occurred. In connection with this attempt to avoid paying attorney's fees, Petitioner offers three questions for consideration.

Petitioner's first question is: "Does the filing of a lien pursuant to a state paving assessment statute constitute a 'taking' within the meaning of the Fifth Amendment to the Constitution of the United States?" This question misses the point of the nature of the case and of Petitioner's own claimed conflict. The district court opinion in *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F.Supp. 997 (D.C.D.—Ariz. 1973) aff'd, 417 U.S. 901 (1974) analyzed a claim of "taking" of a significant property interest under the Due Process Clause of the Fourteenth Amendment, not a Fifth Amendment taking. As will be

discussed, the filing of the assessment liens in connection with the levy of the assessments made without substantial evidence of special benefit did constitute a violation of Respondents' due process rights.

Petitioner's second question is "May a property owner be awarded attorney's fees pursuant to a 42 U.S.C. § 1983 cause of action when the owner has not attempted to obtain just compensation for an alleged 'taking' through available state remedies?" This question again confuses the constitutional violation which occurred, characterizing this case as a Fifth Amendment "taking" case which might in some cases require a suit for inverse condemnation before a taking would occur. The discussion that follows will show a due process violation occurred when Petitioner enacted the void assessment ordinance and filed the liens. Attorney's fees were properly awardable in the proper proceeding for redress of such violation filed by Respondents in state court, resulting in the judgment in this case.

Petitioner's final question is "May a property owner, who has prevailed solely on a state claim, allege a 42 U.S.C. § 1983 cause of action solely to support an award of attorney's fees pursuant to 42 U.S.C. § 1988?" This question grossly misstates the result obtained at trial and the trial court's rationale therefore, and presents a conclusory statement as to why Respondents alleged a 42 U.S.C. § 1983 cause of action. These assumptions and conclusions are not supported by the record and do not present a substantial federal question for this Court to consider.

Each of these questions is incorporated in one of Petitioner's three reasons for granting writ. The dis-

cussion that follows will show that Petitioner's proffered reasons do not withstand careful examination and that the questions presented need not be reviewed by this Court.

# I.

## No Conflict With Spielman-Fond

**There is no conflict between the court of appeals' opinion in this case and the decision in Spielman-Fond, supra, or the several state and federal court decisions following Spielman-Fond, supra.**

For purposes of this discussion, Respondents will assume, *arguendo*, that *Spielman-Fond*, supra, is entitled to the precedential weight attributed to it by Petitioner. *Spielman-Fond*, supra, held that the *mere filing* of a mechanic's lien by a private contractor claimant in the county deed records did not amount to a "taking" of a significant property interest sufficient to require prior notice and opportunity for a hearing in order to comply with the due process requirements of the Fourteenth Amendment to the United States Constitution.

In the instant case, the court of appeals did not find that filing of the liens was unconstitutional because notice and hearing was not had before the filing. What the court of appeals' opinion did state was that the assessment liens filed constituted a taking without just compensation, which was a violation of the United States Constitution sufficient to justify the award of attorney's fees under 42 U.S.C. § 1988.

The assessments were levied and the liens filed *after* a public hearing of sorts. However, at the public hearing, no substantial evidence was presented to the Arlington City Council as to *special benefits accruing to Respon-*

*dents.* (Conclusion of Law No. 9, Court of Appeals Opinion, p.C-5 in Petition for Writ.) Therefore, as the trial court's judgment indicates, the assessment ordinance, which supported the special assessments and the assessment liens, was null and void.

The trial court's judgment follows directly *Village of Norwood v. Baker*, 172 U.S. 269 (1898) which held that an assessment ordinance was void when no determination of the value of special benefits was made. In *Village of Norwood*, *supra*, this Court based its holding on the due process requirements of the Fourteenth Amendment to the United States Constitution stating that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without just compensation. While this Court in *Village of Norwood*, *supra*, spoke in terms of "taking" and "just compensation" the case clearly stands for the proposition that assessment without consideration of special benefit violates the Due Process Clause of the Fourteenth Amendment. The "taking" without just compensation in the instant case and in *Village of Norwood*, *supra*, occurred *when the assessments were made*. The constitutional violation occurred *when the assessments were made*. Certainly this ruling does not conflict with *Spielman-Fond*, *supra*. The taking which was the constitutional violation was more than the "mere filing" of a lien, it was the assessment and subsequent filing of liens. It is true that the assessment ordinance violated the Constitution even if the liens had not been filed. (As a matter of interest, it is

also true that the filing of the liens against homesteads violated the Texas Constitution even if the assessment ordinance had been valid.) It is also true that the liens were not released until the Friday before the trial began on Monday, after significant discovery and pre-trial briefing. This fact alone makes it clear this case involved more than the "mere filing" of a lien. To characterize the judgment and the court of appeals' opinion as improperly finding a constitutional violation by the "mere filing" of lien is such a mischaracterization as to be patently misleading.

The court of appeals may have more completely stated that the assessment ordinance levying the assessments and affixing the liens, which were then filed of record, violated Respondents' rights of due process. However, the court of appeals was correct in its statement that the assessment liens filed by the City *in this case* constituted a taking without just compensation in violation of Respondents' constitutional rights, and that such constitutional violation provides a basis for the award of attorney's fees under 42 U.S.C. § 1988.

Therefore, the court of appeals' opinion in this case presents no real conflict with *Spielman-Fond*, supra. Moreover, it reaches the correct result and presents no questions for review.

Respondents have reviewed all the other federal and state court cases cited by Petitioner to support its alleged conflict. All those cases, save two, were mechanic's lien cases where prior notice and hearing were held not necessary to comply with the due process requirements of the Fourteenth Amendment. Of the other two, one was an

attorney's lien case where prior notice and hearing was held not necessary, and one involved liens for sewer connection and service charges. None involved the assessment issue presented by the instant case. Therefore, the conflict claimed by Petitioner in Reason I simply does not exist.

## II.

### **No Conflict With The Williamson County Regional Planning Commission Case**

Petitioner's second reason to grant writ relies on the recent case of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985). Petitioner claims that, under *Williamson County*, supra, before Respondents could file a 42 U.S.C. § 1983 cause of action and recover attorney's fees for such action, Respondents must have first filed an inverse condemnation suit under the Texas Constitution, and that until a result in such a suit is obtained, no "taking" has occurred. This argument is preposterous. As discussed previously, the constitutional violation occurred in this case when the assessment ordinance creating the assessments and affixing the liens was enacted without consideration of special benefits, in violation of the Due Process Clause of the Fourteenth Amendment. The "proper proceeding for redress" for Respondents was, then, the lawsuit they filed, in State Court, alleging an improper assessment under TEX. REV. CIV. STAT. ANN. art. 1105b and the constitutional claims under 42 U.S.C. § 1983. The available remedy realized by Respondents was the declaration that the ordinance and assessments and liens created thereby, were null and void. An

inverse condemnation suit is simply *not* an available remedy. Even Petitioner recognizes that the inverse condemnation suit allowed by TEX CONST. art. I, § 17, is available to property owners alleging a governmental land use *regulatory* taking. Paving assessments are not the same as a "regulatory taking". The only "procedure" available under TEX. CONST. art. I, § 17, is a suit for inverse condemnation. It is not really a "procedure" but merely an available remedy judicially implied in certain cases where regulatory land use restrictions have effected a taking of property. Such a remedy would have no applicability in this assessment case. Moreover, the trial court already found that the assessments and liens constituted a taking under TEX. CONST. art. I, § 17. Therefore, an additional suit pursuant to that provision would have been unnecessary.

The holding in *Village of Norwood*, *supra*, makes it clear that in such a case as this, where the assessment was an illegal one, the only appropriate remedy is a decree enjoining the whole assessment. 172 U.S. at 291. The state action which constituted the due process "taking" in this case and in *Village of Norwood*, *supra*, was *already complete* when the void assessment ordinance was enacted. It is different from the Fifth Amendment "taking" discussed in *Williamson County*, *supra*, where this Court found that a reasonable and adequate provision exists for obtaining compensation, and the state's action is not complete until the state fails to provide adequate compensation for the taking. In *Williamson County*, *supra*, the Plaintiff filed suit in Federal Court under 42 U.S.C. § 1983, claiming that various zoning laws and regulations amounted to a Fifth

Amendment "taking" without just compensation. This Court held that the 42 U.S.C. § 1983 suit was premature because there had been no final decision by the governmental entity charged with implementing the regulations concerning the applicability of the regulations to the property, and because Plaintiff had not utilized the state procedures for inverse condemnation. 87 L.Ed.2d at 143, 145. Moreover, in *Williamson County*, supra, this Court *did not hold* that if Plaintiff had obtained a final decision by the appropriate governmental entity and had filed suit under Tennessee inverse condemnation laws, joining with such suit a 42 U.S.C. § 1983 claim, Plaintiff would not have been entitled to recover under 42 U.S.C. § 1988 if he prevailed, for the attorney's fees incurred in such suit. See *North Carolina Department of Transportation, et al v. Crest Street Community Council, Inc., et al*, No. 85-767 (1986). In fact, *Williamson County*, supra, did not even address attorney's fees.

In the instant case, the void assessment was an illegal government action that had the same affect as a "taking", constituting an invalid exercise of the police power, in violation of the Due Process Clause of the Fourteenth Amendment. Respondents filed suit in state district court to enforce their constitutional rights to due process of law, seeking the proper remedy (declaration that the ordinance establishing assessments and liens was void), in the "proper proceeding for redress". Attorney's fees were properly awarded. For this reason, and the reasons discussed above, this case is not in conflict with *Williamson County*, supra.

## III.

**No Conflict With *Spencer v. South Carolina Tax Commission***

Petitioner's third reason for granting the writ claims that the decision announced by the court of appeals is in conflict with *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (S.C. 1984) aff'd, 471 U.S. 82 (1985) on an important question of federal law.

Respondents fail to see either a conflict or an important question of federal law. In *Spencer*, supra, the South Carolina Supreme Court upheld the trial court's denial of attorney's fees in a challenge of a state tax statute stating that it could be reasonably inferred that the sole reason the taxpayer alleged 42 U.S.C. § 1983 was to justify allowance of counsel fees. No discussion of the pleadings or the parties' actions concerning same was provided to amplify or explain the rationale of this statement. In the instant case, as stated in the court of appeals' opinion, no special exceptions were filed by Petitioner challenging the pleadings. The trial court issued Conclusions of Law which expressly found that Respondents were entitled to attorney's fees and that no evidence was presented that would show or establish that the award of attorney's fees would be unjust. (Conclusions of Law 20, 21, 22 and 23.) Based on these facts, Petitioner cannot claim, except perhaps with tongue in cheek, that "it can be reasonably inferred that 42 U.S.C. § 1983 was alleged merely to support the award of attorney's fees." There *was* proof in the trial court of a violation by Petitioner of Respondents' due process rights, and unassailed Conclusions of Law to that effect.

Congress' purpose in enacting 42 U.S.C. § 1988 was to ensure effective access to the judicial process for persons with civil rights grievances. Congress intended that a prevailing Plaintiff should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983). 42 U.S.C. § 1988 provides that the Court *may* award attorney's fees. The trial court in the instant case *in its discretion* awarded Respondents attorney's fees. Merely because the South Carolina trial court chose *in its discretion* not to award attorney's fees, does not, in any manner, create a conflict between the legal principals utilized by the two decisions.

Petitioner's reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981) for support is misplaced. Clearly in that case the deprivation occurred as the result of an unauthorized random act, not out of an established governmental procedure or policy. This Court recognized that distinction in *Williamson County*, *supra*. 87 L.Ed.2d at 145.

Contrary to Petitioner's statement, Tex. Rev. Civ. Stat. Ann. art. 1105b was not an exclusive remedy. Petitioner cannot be claiming that the Supremacy Clause of the United States Constitution is not operative in this case. Respondents certainly had the right to bring a 42 U.S.C. § 1983 cause of action in conjunction with the state statutory claim, both of which were based on the same operative facts, an assessment *not* based on evidence of special benefits. It is clear that under Texas law the analysis under Tex. Rev. Civ. Stat. Ann. art. 1105b begins with a constitutional analysis of special benefit. See *Haynes v. City of Abilene*, 659 S.W.2d 638, 641 (Tex. 1983) citing *Village of*

*Norwood*, supra. Accordingly, Petitioner's claim of an exclusive state remedy fails.

Therefore, Petitioner's attempt to manufacture a conflict with *Spencer*, supra, cannot withstand examination, and cannot justify this Court's grant of Writ of Certiorari.

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### CONCLUSION

This case does not present a conflict with any important question of federal law. Attorney's fees were awarded by the trial court in connection with judgment that a paving assessment ordinance and the liens filed pursuant thereto were void, issuing Findings of Fact and Conclusions of Law in support of the judgment. Those conclusions show that the assessment ordinance was enacted without a valid determination of special benefits, in contravention of Respondents' right to due process of law under the Fourteenth Amendment to the United States Constitution. This illegal assessment and the liens filed pursuant thereto caused Respondents to file a proper proceeding for redress to enforce their constitutional rights for which proceeding attorney's fees were properly awarded. The Fourteenth Amendment "taking" occurred, and the state action was complete when the assessment ordinance was passed.

There is no conflict, then, with *Spielman-Fond*, supra, with *Williamson County*, supra, or with *Spencer*, supra. Petitioner has not presented any substantial question of

federal law for consideration by this Court, and the Writ of Certiorari should be denied.

Respectfully submitted,

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